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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

No. 71-1305

DOROTHY L. CARSON,
Petitioner,

vs.

AMERICAN SAVINGS LIFE INSURANCE COMPANY,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Horace S. Meldahl,
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Davidson Bldg. Charleston,
West Virginia 25301

INDEX

Style and prayers for leave to file writ of certiorari, and for writ of certiorari 1
JURISDICTION of United States District Court and of Court of Appeals 2
JURISDICTION of United States Supreme Court 3
DECISIONS BELOW, District Court declined to reinstate dismissal WITHOUT PREJUDICE order because fraud not alleged, Court of Appeals found fraud alleged, but "lacked adequate support in the record," "therefore harmless", but assigned no reason for said conclusions, and disregarded gross and inexcusable negligence of first counsel to inform client properly, or to appeal, timely 8
ERRORS ASSIGNED, gross and inexcusable negligence of first counsel, and fraud established by ample undenied and undeniable evidence in the record. (Inasmuch as the district Judge limited the hearing to the jurisdiction issue it was not possible to prove false other alleged defenses, and that petitioner was entitled to recover on the merits) 7,8
ISSUE NOW, should lower courts be reversed because of alleged gross and inexcusable neglect of first counsel in failing to available evidence, and to take an appeal, and right to reinstatement and trial on the merits because of fraud and deceit of respondent and its president upon the Court and petitioner, whereby she is presently deprived wrongfully of over $75,000 insurance, interest and costs 4,5,6
AUTHORITIES CITED 13-16
ARGUMENT AND CONTENTIONS 12
SUMMARY AND CONCLUSIONS 17

INDEX
CASES, LAW AND AUTHORITIES CITED

Bookout v. Beck, C.A. Cal. 1965, 354 F 2d 823 14
Conerly v. Flower, 410 Fed. Rep. 941 15

Conley v. Gibson, 355 U. S. 41, 48 15
Dansel v. Dansel, 195 F 2d 744 14
Forman v. Davis, 371 U. S. 178 15
King v. Mordewame, D.C. R.I. 1969, 46 F.R.D. 414 13
L P. Stewart Inc. v. Mathews, 329 F 2d 239 16
Lim Kwock v. Brownell, C.A. Tex. 1966, 369, F 2d 808 14
Link v. Wabash Ry Co. 370 U.S. 626, 632 15
Lockwood v. Bowles, 46 F.R.D. 625 14
Menier v. U. S., 405 F 2d 245 15
Parker v. Checker Taxi Co., C.A. Ill. 1956, 238 F 2d 241, cert. denied 355 U.S. 922 14
Pierce v. Bernath Lembcke Co., 20 R.F.D. 116 16
Root Refining Co. v. Universal Oil Products, C.A. Del & Pa. 169 F 2d 514, 335 U.S. 912 336 U. S. 915 14
U. S. v. Rexach, D. C. Porto Riceo. 1966, 641, F.R.D. 180 13
96 A.L.R. 2d 923,
West Virginia Law Review, Vol. 67, page 173,
U. S. Code Annotated, Title 28, Sections 1332, 1441,
U. S. Rules of Civil Procedure, 59(b), 60(b),

INDEX TO APPENDIX

Transcript of Proceedings November 21, 1969, Volume II of Record 21
Exhibits 1 to 10 inclusive filed with same, Volume III of record 41
Circuit Court of Appeals percurium opinion February 4, 1972 49
Circuit Court of Appeals denial of motion for reconsideration, March 14, 1972 52
Motion for reinstatement, October 22, 1969
Order rejecting motion to reconsider July 8, 1971 53
District Court order with Memorandum of Opinion, June 9, 1971 54
District Court order denying motion for reconsideration 57
District Court order with Memorandum of Opinion, December 20, 1968 62
Affidavit of Frihoff N. Allen, respondent president 63

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

No. .....

DOROTHY L. CARSON,
Petitioner,

vs.

AMERICAN SAVINGS LIFE INSURANCE COMPANY,
Respondent,

Petitioner prays for leave to file a petition for writ of certiorari in the above styled matter.

Petitioner, Dorothy L. Carson, prays that a Writ of Certiorari be issued to the United States Court of Appeals — Fourth Circuit, to review the judgment of that court entered in the above entitled case.

JURISDICTION

This action was originally instituted in the Court of Common Pleas of Kanawha County, West Virginia, by Dorothy L. Carson, a resident and citizen of that State, against American Savings Life Insurance Company, a corporate citizen of Arizona, under the "long arm statute" authorized by public law fifteen, seventy-ninth congress of the United States, chapter twenty, first session, senate number three hundred forty, as amended, and West Virginia Code, Chapter 33, Article 4, Section 13, through personal service through the West Virginia State Auditor. It was transferred to the United States District Court for the Southern District of

West Virginia under the provisions of Title 28, Section 1332, and Title 28, Section 1441, United States Code in that it is a civil action wherein the matter in controversy exceeds $10,000 exclusive of interest and costs, and is between citizens of different states, upon petition for removal brought by respondent, who denied that it had transacted business of any kind in West Virginia, and denied particularly that it had solicited or entered into its policy No. 6038 directly or indirectly with Lyle H. Carson, petitioner's deceased husband, in which policy petitioner was and is beneficiary, so as to be subject to a personal action brought in West Virginia.

Petitioner's original counsel failed to present sufficient evidence to refute those allegations of respondent, and her action was dismissed WITHOUT PREJUDICE on December 20, 1968. Some time later during the following spring she was told that Judge Field had failed to give jurisdiction but did not indicate that would end the matter. She testified, "He seemed to think he would go ahead from there. I do not know what he planned to do but he didn't say the case was dropped. Not at all". (Transcript of Proceedings November 21, 1969, pages 16, 17.) Her first attorney did not tell her either the status of a case brought against her by respondent in Arizona, but did tell her that she need not appear in it. Subsequently she learned that she might discover the actual status of both cases from the clerks by obtaining photocopies of the records therein, which she accordingly did, whereupon she learned the actual status of each. She then consulted another lawyer who asked if she had any evidence to dispute the allegations of respondent and its president pertaining to West Virginia involvement in regard to procurement of the insurance policy No. 6038 in which she thought herself to be the beneficiary. She was confident that she and her first attorney did have considerable evidence thereof, but the second lawyer told her he could not help her as long as the matter was in the hands of the first attorney.

Thereupon she and her brother went to see her first attorney who did not acknowledge the actual situation until told that they had obtained the court records and knew. The outcome was that he agreed to withdraw from her case of record and return all papers in his file in regard thereto, but was more than a month doing so.

When the first attorney's file, and all papers in respondent's possession she could find, were taken to the second attorney and he had examined them, he reached the conclusion that petitioner was entitled to maintain her action No. 3653 against respondent in West Virginia, and upon being engaged so to do, he prepared and filed in the United States District Court for the Southern District of West Virginia a motion to reinstate said action on October 22, 1969, ten months and two days from December 20, 1968 when it was dismissed WITHOUT PREJUDICE.

The grounds assigned therefor were gross and inexcusable neglect on the part of the first attorney in not presenting evidence that refutes respondent's allegations by which the dismissal had been obtained, and false, deceptive and fraudulent pleadings and affidavits filed by respondent whereby said dismissal had been obtained, more particularly hereinafter set out. Reinstatement was denied by the District Court on June 9, 1971, rehearing denied, July 8, 1971, and denied by the United States Court of Appeals—Fourth Circuit February 4, 1972 (reported so far only in advance sheets), and rehearing denied March 14, 1972.

UNITED STATES SUPREME COURT JURISDICTION

U. S. Supreme Court jurisdiction exists because said Fourth Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by it; has decided a federal question in a way conflicting with applicable decisions of other federal courts; has so far departed from the accepted and usual course of judi-

cial proceedings, or has so far sanctioned such departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision. Rule PART V (b).

ISSUE NOW—WAS REFUSAL TO REINSTATE ERROR?

This action was instituted originally in the Court of Common Pleas, Kanawha County, West Virginia, under that state's "long arm statute" Chapter 33, Article 4, Section 13; enacted pursuant to powers and privileges available under public law fifteen, seventy-ninth congress of the United States, chapter twenty, first session, senate number three hundred forty, as amended, which declares, "that the business of insurance and every person engaged therein shall be subject to the laws of the several states." (b) (1) "Any of the following acts in this State, effected by mail or otherwise, by an unlicensed foreign or alien insurer: (1) the issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein, (2) the solicitation of applications for such contracts, (3) the collection of premiums, membership fees, assessments or other consideration for such contracts, or (4) any other transaction of business, is equivalent to and shall constitute an appointment by such insurer of the auditor of the State and his successor in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer." Service was duly had on respondent through the State Auditor, and respondent procured its transfer from said Common Pleas Court to the United States District Court for the Southern District of West Virginia under the provisions of Title 28, Sections 1332 and 1441, the amount in controversy originally having been $60,850, and now with interest thereon exceeds $75,000.

In support of West Virginia jurisdiction was an affidavit by plaintiff's original attorney, Dean Lewis. The defendant, now respondent, filed an answer supported by the affidavit of its president, Frihoff N. Allen, averring on oath that said Allen had been president of said respondent since 1954, and had full knowledge of its business and records and that said company had never in any respect or capacity had any dealings with Lyle H. Carson, its insured under policy No. 6038, deceased husband of the beneficiary, petitioner herein in regard to West Virginia.

On February 15, 1968 District Judge Field wrote counsel for both parties mentioning respondent's motion to dismiss and suggesting that petitioner's counsel, Dean Lewis, file a response thereto on or before March 1, 1968, and that thereafter oral argument would be appropriate. The affidavit of Dean Lewis dated and filed March 1, 1968, alleged "upon personal knowledged" based upon thirty years of personal acquaintance, or upon information and belief acquired from the investigation of this matter, that Lyle H. Carson, during his lifetime, was at all times a citizen of the State of West Virginia, having only temporary residence in California and Arizona, and at the time of making application for the insurance policy in this case was a citizen of West Virginia as disclosed by his mailing address on said application of 1548 Jackson Street, Charleston, West Virginia, and that Lyle H. Carson was at the time of his death and for some time prior thereto a resident of West Virginia, as was also plaintiff, hereinafter referred to as petitioner. That defendant corporation received one year's premium in advance from said L. H. Carson, filed with said company's agent, H. L. Vanderhofen, as shown by the application attached to said insurance policy, and that at all times relevant, said insurance company was aware, through its agent, H. T. Vanderhofen, that said L. H. Carson was a citizen of West Virginia and had a then present intent to return there at the time of said application. He further averred that said insurance company performed numerous acts in connection

with said policy which makes it subject to jurisdiction of the West Virginia courts, including, but not limited to, securing proof of death and investigation therewith, numerous correspondence, etc., with the beneficiary, and upon other information and belief, other numerous acts which cannot be properly deliniated without carrying out discovery procedure in this matter, and that this Court is with jurisdiction and should retain this matter for a full hearing on the merits.

On November 12, 1968 Judge Field scheduled a pre-trial conference under Rule 16, for November 29, 1968, at 3:00 P.M., and wrote counsel requesting that certain information be prepared in writing meanwhile. On December 9, 1968 respondent's counsel H. B. Lambert wrote said Lewis, "Agreeable to the suggestion in your telephone conversation this morning, I am enclosing herewith original and two carbon copies of an order which I have prepared pursuant to the written opinion of the court in the above case (Memoradum Opinion November 29, 1968). Please indicate your approval of this order and return the original and one copy to me. The other copy is for your file." That order was signed by Dean Lewis, mailed to said Lambert, and entered December 20, 1968, dismissing the original case WITHOUT PREJUDICE.

Petitioner called her said attorney at a later date, and he told her that Judge Field had refused to give jurisdiction in West Virginia. She testified, "He seemed to think he would go ahead from there. I do not know what he planned to do but he didn't say the case was dropped. Not at all." Transcript of Proceedings November 21, 1969, pages 16, 17. The foregoing is stated so that what followed may be understood.

GROUNDS FOR REVERSAL

The errors relied upon for reversal arise under the pro-

visions of Rule 59(b) and 60(b) Rules of Civil Procedure as follows:

(a) Inexcusable gross neglect on the part of original counsel in not procuring and presenting the available evidence of respondent's dealings with the insured pertaining to West Virginia at the hearing before the District Court on November 21, 1969, and (b) the false, deceitful and fraudulent allegations of respondent's answer and the affidavit of its president, Frihoff N. Allen, which the judge stated in his Memorandum of Opinion dated November 29, 1968 commencing at the bottom of the first page and continuing through parts numbered (1), (2), (3), (4), (5), (6), (7), (8) and the paragraph following, where the Court said, "The dismissal motion is supported by an affidavit executed by the president of the defendant insurance company. The affidavit supports the basic grounds assigned in the motion particularly in regard to the absence of any business activities of the defendant in the State of West Virginia. The affidavit, as well as the copy of the application which was filed as an exhibit with the complaint, indicates that at the time of the application on April 22, 1966, Carson indicated that his residence was in Phoenix, Arizona. He further stated that his previous residence had been in the State of California, and that his new address would be 1548 Jackson Street in Charleston, West Virginia. The policy in question, No. 6038, was delivered to Carson in Phoenix, Arizona, on or about June 30, 1966."

The Court obviously forgot about the statement in regard to the new address, and was misled by respondents averment and affidavit that the policy was delivered to Carson in Phoenix, Arizona on or about June 30, 1966, which was two days after it was received and stamped at the Charleston, West Virginia post office, but delivered a day or two later to the residence and abode of Carson and petitioner at 3708 Washington Street, South West. South Charleston, West Virginia, as shown by the testimony and exhibits in the Transcript of Proceedings November 21,

1969 in said District Court. Practically all of the material statements contained in respondent's answer and affidavit were proved false and fraudulent by the testimony and exhibits filed at the proceedings on November 21, 1969, which are included in Volumes II and III of the record. These grounds, of inexcusable gross neglect on the part of original counsel, and fraud and deceit on the part of respondent and its president, are extrinsic because they deprived petitioner of a hearing on the merits.

The Fourth Circuit Court of Appeals, in its decision February 4, 1972, in this case, No. 71-1801, in the last paragraph on page 3, recognized that the District Court had committed error in its decision June 9, 1971, saying in that paragraph, "The district court in its order of June 9, 1971, erroneously stated, as one of its reasons for denying the appellant's motion of October 22, 1969, that the appellant had made no allegation of fraud in that motion. While it appears from the record that appellant, in her October 22, 1969 motion, did, in fact, charge that American had perpetrated a fraud upon the district court which induced the court to enter its dismissal order of December 20, 1968, it further appears that the charge of fraud lacked adequate support in the record. Therefore, we conclude that this error of the district court was harmless." The Fourth Circuit gives no reason whatever as to why the charge of fraud lacked adequate support in the record, or why it was harmless. Counsel for petitioner believes that both of these statements are contrary to the evidence and lack any evidence to support them. The evidence to the contrary is overwhelming as we shall proceed to see. At the time of the hearing on November 21, 1969 the District Judge indicated that had the evidence then presented been presented prior to the entry of the order December 20, 1968, that order would not have been to dismiss. During the twenty months he waited to render his decision he obviously forgot numerous facts. He was so busy with other matters that he ignored two letters and a motion requesting a further hearing to refresh his mem-

ory in regard to the facts. The main contention of respondent's counsel during that time was that an appeal had not been taken within the time allowed. This contention was disposed of by the Fourth Circuit Court of Appeals in its per curiam opinion February 4, 1972 in the last paragraph commencing on page 2, as follows: "On July 29, 1971, appellant noted her appeal from the district court's order of June 9, 1971, and July 8, 1971. American contends that appellant's notice of appeal with respect to the district court's order of June 9, 1971, is untimely. However, a motion for "reconsideration" is functionally a motion under Rule 59(e), Fed. R. Civ. P., and abates the running of the thirty-day period within which to appeal. The thirty-day appeal period begins to run anew from the entry of an order disposing of the motion for reconsideration. 9 J. Moore, Federal Practice paragraph 204.12(1), at 949 (2nd E. 1970). Petition to rehear was denied March 14, 1972.

Some remarks of the district judge intimated that the time between the order of December 20, 1968, and filing the motion for reinstatement October 22, 1969 was longer than it should have been. That was contrary to what he had said at the proceedings November 21, 1969, which was, "Whether it was ten months or eleven months is not important in the overall principle of the thing." (Last sentence of Transcript, page 29). The statute allowed twelve months, but in fraud and deceit even years were not a bar. The delay under the circumstances of this case was not unreasonable, as petitioner and her new counsel acted as promptly as possible from the time of discovery, and pendency of the respondent's action in Arizona also tolled the calendar rule here. The delay here was surely excusable since petitioner was still relying upon her first attorney to do everything possible in her behalf.

PROOF OF FRAUD AND DECEIT

Conclusive proof that the allegations of respondent's answer, and of the affidavit of its president, were false and

fraudulent, were furnished in the testimony and exhibits filed therewith taken November 21, 1969, and constitute Volume II and Volume III of the record. Exhibit 1 was a receipt for $2,500 "for the full first premium specified in the application for the insurance to American Savings Life Insurance Company" plus "Receipt for Double Indemnity $85.50 in full, H. L. V. (signed) H. L. Vanderhofen, Agent." Exhibit 2 was a check for $25 payable to H. L. Vanderhofen, dated April 23, 1966, (signed) Lyle H. Carson. This was given on the date of the physical examination by the company's examining physician, Dr. Shile, and is presumed to be payment for said examination. Exhibit 3 was a receipt dated June 24, 1966, on American Savings Life Insurance Company stationery, for $2,475.90, marked "Paid to June 22nd, 1967," addressed by typewriter to Lyle H. Carson, 3708 Washington Street, South West, South Charleston, West Virginia. Exhibit 4 is the front and back of the envelope addressed to Lyle H. Carson, 3708 Washington Street, So. Charleston, W. Virginia 25309, with return address of H. L. Vanderhoofen, 4611 Benridge Lane, Glendale, Arizona, the agent of respondent, bearing Phoenix, Arizona post office stamp dated June 25, 1966, and registry number 222365, and Charleston, West Virginia post office stamp showing date of receipt there June 28, 1966, which petitioner testified was the envelope in which the policy was received at 3708 Washington Street, So. Charleston, W. Virginia, either the next day or the day following, the latter being the date upon which the receipt for the policy was signed and mailed to respondent or its agent. Exhibit 5 is a letter to Lyle H. Carson, 1548 Jackson Street, Charleston, W. Va., reading in part, "This is in reply to your inquiry concerning the life insurance purchased from our Agent, Mr. Vanderhofen. We are sorry to advise that your policy No. 6038 was mailed to the wrong address. However, Mr. Vanderhofen has since mailed it to your present address. If you have not received same, please let us know." (Signed) American Savings Life Insurance Company, Lucy Broberg, Corre-

spondence Dept. Exhibit 6, is a letter to Dorothy L. Carson, 1548 Jackson Street, Charleston, West Va., also on respondent's stationery, dated November 15, 1966, reading in part, "We wish to extend our sincere sympathy in the loss of your husband, Lyle H. Carson, who was insured by this Company on policy No. 6038. We are enclosing the necessary forms, which you will need to read carefully and complete in every detail possible. Please return these forms to us with the additional papers requested and your insurance policy, at which time we will promptly process your claim and advise you. Sincerely, AMERICAN SAVINGS LIFE INSURANCE COMPANY, (signed) Richard Uhnangst, Comptroller." (Why was this widow asked to return the policy? Doesn't this smack of fraudulent intent?) Exhibit 7 is a premium due notice dated August 22, 1966 on respondent's stationery, for $222.83 to become due on policy 6038, addressed to Lyle H. Carson, 3708 Washington Street, South West, South Charleston, West Virginia. Exhibit 8 is a premium due notice on the same kind of stationery, in the same amount, for September 22, 1966, sent to Lyle H. Carson, 3708 Washington Street, South West, South Charleston, West Virginia. Exhibit 9 was a "RECORD OF PAYMENT" on the same type of stationery, for the same amount, and policy number, sent by respondent to Lyle H. Carson, 3708 Washington Street, South West, South Charleston, West Virginia. Respondent admits that all of the premiums due on said policy were met on time and that said policy was in force at the time of the death of Lyle H. Carson, and that petitioner is the beneficiary named in said policy. The picture of Dorothy L. Carson, the petitioner, and Lyle H. Carson, her late husband, standing in front of their Lincoln automobile, and home at 3708 Washington Street, South West, South Charleston, West Virginia included in the Transcript of Proceedings November 21, 1969, was exhibited to the Court and filed at said hearing. At the said hearing petitioner testified, "I didn't know (of the dismissal December 20, 1968) until some time in the spring." Transcript of Proceedings November 21, 1969, page

15. "Mr. Lewis knew I had the premium notices, and he had the receipts himself. I turned them over to him." (Transcript, page 14) Counsel: "Did he ever ask for those other papers?" Petitioner; "No, I don't suppose he did." (Transcript, page 15). Petitioner, "I always regarded West Virginia as my home." (Transcript, page 19).

The Court limited the hearing throughout to the West Virginia jurisdictional question.

ARGUMENT AND CONTENTIONS
(h) and 3

Just how did the charge of fraud lack adequate support in the record, and how was it harmless? It unquestionably deprived the petitioner of the right to maintain her action. Under the Courts ruling she could not prove more without reinstatement, and the Court declined to hear more. The West Virginia "long arm" statute, and the act of Congress authorizing it, were adopted to prevent injustice where it was prohibitive for a West Va. beneficiary to maintain her action such as in Arizona, because she would have to travel there, where she could not hope to have her doctors come to testify in person, or to get counsel without agreeing to pay a large share of her recovery, and she was unable financially to meet other expenses. Her appeal to the Fourth Circuit had to be, and was granted by the district court, in pauperis. Depositions would be expensive also, and they would never be as effective as having the Jurors or Judge see and hear her doctors testify in person. All of them have been consulted by petitioner's present West Virginia counsel and he is satisfied that their testimony will support and establish the petitioner's right to recover. He also has in his possession the hospital records. The trial judge did not permit any of these to be presented in evidence.

Falsehood in respondent's answer and the affidavit of its president was obvious from the exhibits filed at the No-

vember 21, 1969 hearing. The only question at that time was whether or not there had been unreasonable delay in presenting the motion for reinstatement of the case. Under the circumstances it was unreasonable to expect it to have been applied for more quickly. Why was it worse for her to be unable to get a motion for reinstatement filed by her second attorney in less than three months from the time she was able to get her first attorney to return her papers and release the case, than it was for the district judge to render a decision twenty months after the case had been submitted, and for him to decline to hear arguments to refresh his recollection of the facts and law previous thereto when most judges would have decided that simple issue forthwith, if he had not been in great doubt about what would be the proper decision.

The fraud perpetrated on authorities petitioner and the court was an extrinsic or collateral fraud, as it deprived her of an opportunity to get her case heard upon its merits. In U. S. v. Rexach, D. C. Porto Rico, 1966, 41 F.R.D. 180, the District Court said, "Fraud is regarded as extrinsic or collateral for purposes of setting aside a judgment on that basis when it prevents a party from having a cause of action or defense, or induces him to withdraw a defense, or operates upon matters pertaining not to the judgment itself, but to the manner in which it was procured. Relief from judgment on account of fraud will be granted in cases in which, by fraud or deception practiced on the unsuccessful party he was prevented from exhibiting fully his case, by reason of which there never was a real contest before the Court on the subject matter of the suit."

In King v. Mordewamc, D. C. R. I. 1969, 46 F.R.D. 474, the court held, "Where grounds of motion to vacate dismissal were gross negligence of plaintiff's former counsel and absence of neglect on part of plaintiffs, motion could properly be made under sub-division (b) (6) of this rule (60) for any other reason justifying relief, other than those speci-

fied under sub division (b) (1) of this rule for excusable neglect." "Relief under motion to vacate dismissal for reasons other than those specified should be granted where plaintiffs are unaware of their attorney's gross neglect in failing to prosecute and where as soon as new counsel becomes involved such motion is made." Id.

"The court may at any time set aside judgment for after-discovered fraud upon the Court." Dansel v. Dansel, 195 F. 2d 744. "The trial court can vacate its own judgment for fraud, and likewise the appellate court can, for fraud, vacate decree of trial court entered pursuant to mandate of appellate court." Root Refining Co. v. Universal Oil Products Co., C. A. Del & Pa, 169 F. 2d 514, Certiorari denied, 335 U. S. 912, Rehearing denied, 69 S. Ct. 602, 336 U. S. 915. "Inherent right of court to vacate judgment for fraud is strengthened by subdivision (b) of this rule (60) providing that on motion court may relieve party from final judgment or order for fraud, misrepresentation, or other misconduct of adverse party." Parker v. Checker Taxi Co., C. A. Ill 1956, 238 F2d 241, Certiorari denied 77 S. Ct. 681, 353 U. S. 922.

"There is no time limitation which would bar a civil district court from granting relief from a final judgment upon ground of fraud upon the court." Lockwood v. Bowles, D.C. D.C. 1919, 46 F.R.D. 625.

Motion brought within one year to set aside judgment on ground that it was void was brought within reasonable time." Bookout v. Beck, C.A. Cal. 1965, 354 F. 2d. 823.

Lim Kwock Soon v. Brownell, C.A. Tex. 1966, 369 F 2d 808 holds, "Judgment entered in prior case declaring that appealing parties were citizens, would be vacated, and district court would be authorized and empowered to enter such rulings, orders and judgments as to it might appear appropriate to correct fraud perpetrated upon the court by appealing parties."

In Forman v. Davis, 371 U. S. 178, Justice Goldberg delivered the opinion of the Supreme Court, saying, "The defect in the appeal did not prejudice the respondent. * * *The Court of Appeals should have treated the appeal from the denial of the motions as an effective attempt though inept to appeal from the judgment sought to be vacated. * * * It is too late the day, and entirely contrary to the spirit of Federal Rules of Civil Procedure, for decisions on merits to be avoided on the basis of mere technicalities."

In Conley v. Gibson, 355 U. S. 41, 48, the Supreme Court said, "The Federal Rules reject the approach that pleading is a game of skill to which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. The rules themselves provide that they are to be construed "to secure the just, speedy and inexpensive determination of every action." * * "If the underlying facts or circumstances relied upon by plaintiff may be proper subjects of relief he ought to be afforded an opportunity to test his claim upon the merits."

In Link v. Wabash Ry. Co., 370 U. S. 626, 632, the Supreme Court said, "Rule 60(b) relief acts as a corrective remedy, mitigating the harsh impact of calendar rules when a litigant's action is dismissed as a result of counsel's neglect."

In Menier v. U. S., 405 F 2d 245, the Court said, "Rule providing for relief from judgment gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice."

In Conerly v. Flower, 410 Fed. Reporter 941, a settlement for $19,500 was set aside because of the Insurance Company's representation that maximum coverage was $20,000 when in fact it was $40,000, for which the jury returned a verdict, the court saying, "Under rule providing for vacation of judgment order in event of fraud, problem of finality

is not involved, since latter motion does not affect time for appeal nor finality of judgment itself," Fed. Rules of Civil Procedure 50(b), 59(e), 60(b).

In Pierre v. Bornath Lembcke Co., 20 R.F.D. 116 it was held the motion to set aside the judgment was in time though made eight years after the dismissal order, and in L. P. Steuart, Inc. v. Matthews, 329 F. 2d 234, it was set aside for gross and inexcusable neglect of attorney. See 96 A.L.R. 2d at page 823, and West Virginia Law Review, Volume 67, page 173, February 1965.

The Fourth Circuit gives no reason or explanation concerning why the charge of fraud lacked adequate support in the record. That is a mere conclusion without basis, and contrary to the evidence which showed that thereby petitioner was deprived of more than $75,000 due her under policy No. 6038. How could the error of the district court, which the Fourth Circuit found had been committed, be "harmless?" In the hearing on November 21, 1969 the Court limited the testimony to the single issue of jurisdiction and would not go further. On page 28 of the Transcript the Court said, "All I am interested in in the context of what we have here in this case, is what permissive area, if any, does this Court have under Rule 60(b) to reconsider its action on that motion?" (The action referred to was entry of the judgment December 20, 1968) * * * "I assume that you gentlemen (respondent's counsel) would take the position that there are no grounds demonstrated here that would permit the Court to reconsider it under 60(b), and I assume Mr. Meldahl will strenuously search the books to find something that indicates the Court does have authority. That's what I am interested in. Whether it is ten months or eleven months is not important in the overall principle of the thing."

At the bottom of page 11 of the Transcript petitioner's counsel said to the Court, "I think the purpose we have here today is merely to establish jurisdiction." The Court:

"That is correct." Counsel continuing, "And that we won't go into the health situation." The Court (agreeing) Then saying, "All right, gentlemen, do you want to cross-examine?" Mr. Lambert (American Savings Life attorney) "I don't think we have any cross-examination." On page 17 of the Transcript, The Court: "Mr. Meldahl, our threshold step here this morning is consideration of this motion to vacate the jurisdictional dismissal, and if the Court should see fit to grant that motion, then it would be appropriate to go into these other questions involving the Arizona proceedings and what not, so I expect probably it would be just as well not to go further with that this morning. Just confine ourselves to this jurisdictional question!"

Under the circumstances it was not possible to go further into the merits of the case, as the Court denied reinstatement by the order entered June 9, 1971.

SUMMARY AND CONCLUSIONS

The provisions of the West Virginia "long arm" statute, Code, Chapter 33, Article 4, Section 15 (b) (1) were undoubtedly met, as follows: "Any of the following acts in this State, effected by mail or otherwise, by an unlicensed foreign or alien insurer: (1) "The issuance or delivery of contracts of insurance to residents of this State, or to corporations authorized to do business therein;".

The undisputed evidence is that the insured told respondent in his application that he intended to return to West Virginia so soon that he considered it important to advise them of that fact in his application; he and his family left Arizona one week later, and arrived back by automobiles two weeks later; respondent's agent was informed thereof, and of his address at 3708 Washington Street, South West, South Charleston, West Virginia, approximately six weeks before the policy was issued; it was not delivered in Arizona, as respondent and its president claimed, but was mail-

ed to him by registered letter delivered to said South Charleston address; that the policy was delivered to respondent's agent to transmit it to him as respondent acknowledged he did; that said transmission was approved by letter in reply to an enquiry about the policy, and he received from respondent's home office an implied offer to see that he got it if not already received; the insured was an actual resident of West Virginia at the time the policy was issued, as well as when it was mailed, and when it was received, and he was a resident of West Virginia throughout the period involved.

(2) the solicitation of applications for such contracts;

There is certainly a presumption that respondent's agent, whom the company claims it paid for obtaining the application and contract which was entered into directly by respondent after two months investigation under policy 6038, solicited the business; the company acknowledged receipt of the premiums in cash, and petitioner says no such deal as alleged was made according to her information. Testimony concerning transactions with deceased persons are not admissible in evidence, and payment in property for which the agent agreed to pay the premiums, and did do so would be a valid consideration anyway. Commissions respondent paid its agents were not any concern of the insured anyway.

(3) the collection of premiums, membership fees, assessments or other considerations for such contracts; Respondent has admitted receipt of the premiums in cash in writing.

The respondent, since the taking of the testimony on November 1, 1969, has admitted that it sent the premium notices and receipts for payment of the premiums to Lyle H. Carson, 3708 Washington Street, South West, South Charleston, West Virginia, (Exhibits 1, 3, 7, 8, 9,) and that all of the premiums and consideration for said policy were paid, and received by it, and that Lyle H. Carson was in-

sured on said policy 6038 at the time of his death in its letter to petitioner, dated November 15, 1966, Plaintiff's Exhibit No. 6, addressed to her at her West Virginia address by respondent comptroller.

(4) any other transaction of business;

Respondent's claim prior to the taking of the testimony on November 21, 1969 that the premiums were being paid to it in Arizona by its agent is contrary to its premium notices and receipts mailed directly to the insured at 3708 Washington Street, South West, South Charleston, West Virginia, which it cannot be heard to refute. It makes no difference anyway if the insured paid the agent the consideration.

The Court of Appeals found that error had been committed by the District Court, but said it was harmless. How could it be harmless when it deprived petitioner of more than $75,000 dollars now due her, besides all of the worry, inconvenience and expenses which have resulted? The Fourth Circuit must have assumed that this case is like the usual case before that court where it has been heard fully upon its merits, yet this one involves only the issue of jurisdiction, to which issue it was confined by the District Court as herein before shown. So far as the merits are concerned petitioner's present counsel has conferred with all of the physicians involved and gotten all pertinent hospital records, as well as consulted with other witnesses, examined a transcript of the proceedings in the Arizona court and Arizona appellate court decisions proving conclusively that said Arizona court never had jurisdiction. He is confident that this case can be won on its merits if the dismissal order of December 20, 1968, obtained by the false, deceitful and fraudulent answers of respondent, and false, deceitful and fraudulent affidavits of its president, Frihoff N. Allen, denying that said policy of insurance No. 6038 was delivered to the insured, Lyle H. Carson, in West Virginia; denying that the premium notices and receipts were mailed to his

West Virginia address; denying the letters showing that said respondent was fully aware thereof; denying knowledge of the whereabouts of said insured in West Virginia; denying that he was a resident of West Virginia although its agent H. L. Vanderhofen, addressed him there; and knew all other facts pertinent to said insurance policy; and the records of said respondent company contained such information at the time said answers and affidavits were made, which prove conclusively the falsity of such claims, and are contrary to allegations of said answers and affidavits, which constituted deceit and fraud on petitioner and also upon the court, so that by reason thereof said Civil Action No. 3653 should be reinstated and proceeded in upon its merits.

Respectfully submitted,
Horace S. Meldahl,
Attorney at Law admitted
to practice before the
Supreme Court of the
United States November 30, 1950,
Davidson Building, Charleston,
West Virginia 25301
Attorney for Petitioner

VOLUME NO. II

RECORD ON APPEAL

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1801

DOROTHY L. CARSON — Appellant

v.

AMERICAN SAVINGS LIFE
INSURANCE COMPANY, — Appellee.

OFFICIAL REPORTER'S TRANSCRIPT
OF
PROCEEDINGS ON NOVEMBER 21, 1969

FILED
NOV. 28, 1969
CLERK'S OFFICE, U. S.
DIST. COURT, SO. DIST. W. VA.
VIRGIL F. FRIZZELL, CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
at Charleston

DOROTHY L. CARSON,

Plaintiff,

v. Civil Action 3653

AMERICAN SAVINGS LIFE
INSURANCE COMPANY,
Defendant.

Proceedings before the Honorable John A. Field, Jr., United States District Judge, on the 21st day of November, 1969.

Appearances:

MR. HORACE S. MELDAHL, counsel for plaintiff

MESSRS. HARRY B. LAMBERT and A. GARNET THOMPSON, counsel for defendant

FILED
AUG. 31, 1971
SAMUEL W. PHILLIPS
CLERK

PROCEEDINGS

THE COURT: This is Civil Action 3653, Dorothy L. Carson v. American Savings Life Insurance Company. On the action as instituted the defendant insurance company filed a motion to dismiss, among other things taking the position that it was not amenable to in personam jurisdiction under the West Virginia long arm statute.

By a letter ruling of Novermber 29, 1968 I sustained the insurance company's position on that motion and an order was entered on December 20th of 1968 referring to the letter ruling and dismissing the action without prejudice, of course, to Mrs. Carson as far as the merits were concerned. Mr. Dean Lewis was counsel for the plaintiff through that stage of this action and the case as a matter of fact was retired from the docket.

On October 22, 1969 Mr. Meldahl, who appears here this morning as counsel for Mrs. Carson, filed a motion to vacate the dismissal order and I think also filed an affidavit and some supporting material and local counsel for American Savings Life Insurance Company were served with a copy of the motion and they appear here today and have filed a response, understandably objecting to the granting of the motion to vacate the dismissal, so we are in that situation this morning.

Now, Mr. Meldahl, I will be happy to hear from you.

MR. MELDAHL: I don't know whether Mr. Lewis has withdrawn officially or not, but at any rate he told me he was agreeable. He returned the papers and I discussed it with him and he promised to be here this morning at this time but I don't see him, so I thought he would tell the Court he is retired from the case.

THE COURT: I see two ladies in the courtroom. I assume one of those is Mrs. Carson.

MR. MELDAHL: That's right.

THE COURT: We will proceed on the assumption that Mr. Lewis no longer represents Mrs. Carson and that you have succeeded him in this case.

MR. MELDAHL: In this case we have alleged that this order which the Court has just mentioned having entered on December 20th, 1968 was procured by misstatements, misrepresentations and by deceiving the Court, and I think also deceiving Mr. Lewis, in regard to the facts in the case.

We have alleged in our motion what we believe to be the facts in the case and I want to support that now, if I may, with the testimony of Mrs. Carson and the documents that we have to substantiate that.

THE COURT: All right. I had not anticipated an evidentiary hearing. Will it take you long to put that on, Mr. Meldahl?

MR. MELDAHL: No, it will not take very long.

THE COURT: All right; if you want to call Mrs. Carson.

MR. MELDAHL: I have already shown opposing counsel at least most of these instruments, so they are acquainted with what they pertain to. Mrs. Carson, will you please come up?

THE CLERK: Will you please state your name?

THE WITNESS: Dorothy Louise Carson.

DOROTHY LOUISE CARSON

the plaintiff, called as a witness in her own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELDAHL:

Q Please state your name.

A Dorothy Louise Carson.

Q Mrs. Carson, are you the plaintiff in the case against American Savings Life Insurance Company now pending in this Court?

A Yes.

Q Have you arranged with me to be your counsel at this time?

A Yes.

Q Have you withdrawn the case from Mr. Dean Lewis?

A Yes.

Q I want to hand you some papers and ask you to identify them and explain what they are.

MR. MELDAHL: First I will ask that all of these be marked.

THE COURT: Let Mrs. McDermid mark each one and then you can just refer to them by exhibit number.

THE CLERK: Plaintiff's Exhibits Number 1 through 10 marked for identification only.

Plaintiffs' Exhibits 1-10
for Identification

The papers referred to were marked as indicated above.

THE COURT: Mr. Meldahl, just go ahead and inquire of Mrs. Carson about the exhibits and then hand them to these gentlemen after you have questioned her about them. They can get the benefit of the exhibits in the context of her testimony about them and probably help us out some.

Q Mrs. Carson, please examine the paper I now hand you which is marked Plaintiff's Exhibit 1 and tell the Court what that is.

A Well, that was a check Mr. Carson gave Mr. Vanderhoofven for double idemnity on the policy that he took from him.

Q State the date of that check.

A That is April 23, 1966.

MR. MELDAHL: We now offer this in evidence.

THE COURT: Hand it to Mr. Lambert. You may go ahead and inquire of her.

Q Please examine the paper that I hand you, which is marked for identification Plaintiff's Exhibit Number 2, and tell the Court what that is.

A This was a recepit from Mr. Vanderhoofven that the premiums had been paid in full on the insurance policy.

THE COURT: What was the date of that?

THE WITNESS: That was April 1st, 1966.

MR. MELDAHL: We offer this one in evidence.

Q Please examine the paper I have just handed you marked for identification Plaintiff's Exhibit Number 3 and tell the Court what it is.

A Well, this is another receipt from Mr. Vanderhoofven. He issued a new one when the policy was received, and it is dated June 22, 1966, that it was paid in full.

MR. MELDAHL: We now offer this in evidence.

Q Please examine the envelope I now hand you, which is marked for identification Plaintiff's Exhibit Number 4, tell the Court what it is.

A Well, this is an envelope that the policy was received in in South Charleston by me and it was dated from Phoenix, Arizona, June 25th.

THE COURT: June 25 of 1966, Mrs. Carson?

THE WITNESS: Yes, 1966.

Q What date was it stamped as being received at Charleston?

A Well, I don't know.

THE COURT: June 28th, 1966, Mr. Meldahl.

MR. MELDAHL: We offer this in evidence.

Q Please examine the paper that I now hand you, which is marked for identification Plaintiff's Exhibit Number 5, and state what it is.

A Do you want me to read the letter?

Q No, just state what it is.

A Mr. Carson had wrote to the insurance company concerning the policy because he had never received it and they wrote back to him and told him that they had mailed it to the wrong address but Mr. Vanderhoofven has since mailed it to your present address.

THE COURT: And this was addressed to Mr. Carson at what address?

THE WITNESS: This was addressed to 1548 Jackson Street at Charleston, as he gave that on his application.

Q Do you know where this letter was received?

A It was received at 1548 Jackson Street at his mother's home.

MR. MELDAHL: We now offer this in evidence.

Q Please examine the paper I now hand you, which is marked for identification Plaintiff's Exhibit Number 6, and explain what that is.

A Well, this is dated November 15th and it is from the American Savings Life Insurance Company expressing their sympathy at Mr. Carson's death and telling me they were enclosing the forms for me to fill out to send back.

THE COURT: Was this directed to you at 1548 Jackson Street?

THE WITNESS: Yes.

THE COURT: All right.

MR. MELDAHL: I offer this in evidence.

Q Please examine the paper I now hand you, which is marked for identification Plaintiff's Exhibit Number 7 and tell the Court what it is.

A Well, this was a premium due notice from American Savings Life Insurance Company and it was mailed to Lyle H. Carson, 3708 Washington Street Southwest, South Charleston, West Virginia.

THE COURT: What date does that bear?

THE WITNESS: That's August 22.

MR. MELDAHL: I now offer this in evidence.

THE COURT: All right, sir.

Q Please examine the paper I now hand you, which is marked for identification Plaintiff's Exhibit Number 8, and tell the Court what it is.

A This is a premium due receipt from American Savings Life Insurance Company to Lyle H. Carson, 3708 Washington Street Southwest, South Charleston, West Virginia, and it is dated September 22, 1966.

MR. MELDAHL: I now offer this in evidence.

Q Please examine the paper I now hand you, which is marked for identification Plaintiff's Exhibit Number 9, and tell the Court what it is.

A Well, this came along with the notice of premium.

It is a record of payment from American Savings Life Insurance Company dated October 22 to Lyle H. Carson, 3708 Washington Street Southwest, South Charleston, West Virginia.

MR. MELDAHL: We now offer this in evidence.

THE COURT: All right, sir.

Q Please examine the instrument I now hand you, which is marked for identification Plaintiff's Exhibit Number 10, and tell the Court what it is.

A That is a picture of Mr. Carson and myself. It was taken in June of 1966.

Q Where was that taken, Mrs. Carson?

A At Jefferson Park, 3708 Washington Street Southwest.

Q Where?

A In South Charleston.

Q And that's South Charleston, West Virginia?

A Yes. This was here in front of the home in which we were living.

Q Is that West Virginia?

A Yes, in West Virginia.

Q There is an automobile that appears in that picture. Whose automobile was that?

A That was our car. In fact, it was my car.

Q And where was this picture taken with reference to your home?

A It was directly in front. Well, it wasn't directly in front. It was more on the side.

Q In the street?

A In the street in front of the house.

Q Side of the house?

A Well, no, it was in front of the house but you can't see the house in the picture but you can see the neighbor's house.

MR. MELDAHL: We now offer this in evidence.

THE COURT: All right, sir. They will be admitted.

THE CLERK: Plaintiff's Exhibits 1 through 10 admitted in evidence.

The papers referred to, previously marked for identification, were admitted in evidence.

Q Mrs. Carson, when did you and your husband leave Arizona for West Virginia?

A We left there the 1st day of May, 1966, we left Phoenix, Arizona.

Q How is that?

A We left Phoenix, Arizona at that time.

Q On what date did you arrive in West Virginia?

A May 7th, 1966.

Q Did you and Mr. Carson leave West Virginia at any time after you came here on that occasion prior to his death?

A I never left the state and the only time he left the state was when he went to Cleveland Clinic in Ohio.

Q How long was he there?

A Well, it was only a few days. I can't recall the exact number.

MR. MELDAHL: I think the purpose we have here today is merely to establish jurisdiction.

THE COURT: That is correct.

MR. MELDAHL: And that we won't go into the health situation.

THE COURT: All right, gentlemen, do you want to cross-examine?

MR. LAMBERT: I don't think we have any cross-examination.

THE COURT: Mrs. Carson, when the Court passed on this dismissal last December it was done on the basis of certain affidavits submitted by Mr. Lewis as your attorney and affidavits submitted by these gentlemen representing the defendant insurance company. Had you discussed with Mr. Lewis this material that Mr. Meldahl has presented in evidence here today?

THE WITNESS: Well, I told him as much as I knew about the case. I don't know exactly what that was but I gave him, you know, what he asked me to give him and

the papers and things.

THE COURT: Did he have these papers available that Mr. Meldahl has submitted here this morning, or do you remember now?

THE WITNESS: I don't remember, but he knew that we did receive the premium notices in West Virginia and he knew that we were residing here, and he also knew that Mr. Carson stated that he was coming back here in his application.

THE COURT: All right; any questions, gentlemen? Mr. Lambert?

CROSS-EXAMINATION

BY MR. LAMBERT:

Q Mrs. Carson, you had these papers available when this case was brought here in the Common Pleas Court of Kanawha County, did you not? You had these papers that Mr. Meldahl has introduced in evidence?

A Yes, I had them.

Q And you discussed the case pretty thoroughly with Mr. Lewis, didn't you?

A Yes.

Q And he had been a friend of the family for many years? Isn't that a fact? Mr. Lewis.

A I beg your pardon?

Q Mr. Lewis had been a friend of the Carson family for many years. Isn't that true?

A Well, I have known Mr. Lewis since he was a little boy.

Q You didn't find any of these papers within the last month or so, did you?

A I have had the papers all the time.

MR. LAMBERT: You have had them all the time. That's all.

REDIRECT EXAMINATION

BY MR. MELDAHL:

Q When did you receive these papers recently?

A Well, they were in California. My son mailed my portafile here with all the papers in it and they were in the portafile.

Q How did you come to go to California?

A I received a summons from American Savings Life Insurance that I was supposed to appear in Phoenix, and since my son and his wife was going back to California I decided my small son and I should make the trip with them so I would be handy to go to court in Phoenix, Arizona.

Q That was in order to testify in the case out there if you were called?

A Yes.

Q Did you understand that they were asking you if all of these papers that have been introduced here this morning were in the possession of Mr. Dean Lewis at the time this matter was presented to this Court?

A Well, I don't exactly understand. Mr. Lewis knew that I had the premium notices and he had the receipts himself. I turned those over to him. They showed the premiums had been paid in full.

Q Why did you withdraw this case from him?

THE COURT: I don't believe that that would be material.

Q Were any of the papers that were introduced here this morning not in the possession of Mr. Lewis?

A Well, I had some of the premium notices that I hadn't given to Mr. Lewis, but I was under the impression I give him one of them. I'm not sure about that. I think I did.

Q What about the letters that were introduced here this morning?

THE COURT: From the company?

MR. MELDAHL: Yes, from the company.

A Well, really I don't recall. It has been three years.

THE COURT: That's understandable. I think Mrs. Carson has made it clear.

Q Did you turn over to him the envelope in which you received the policy?

A I don't know.

Q Did he ever ask for those?

A No, I don't suppose he did.

Q Were you ever told that this Court had dismissed this case?

A Well, I didn't know it until sometime in the spring.

Q The spring of what year?

A 1969.

Q And how did you learn about it?

A I called Mr. Lewis.

Q What did he tell you?

A He told me that Judge Field had refused to give jurisdiction in the case, in West Virginia.

Q Did he tell you anything about what he planned to do about it?

A No.

Q Was it your understanding that that terminated the matter?

A No, he seemed to think he would go ahead from there. I don't know what he planned to do but he didn't say the case was dropped. Not at all.

Q What about the case in Arizona?

A I never knew anything about that at all until I wrote to the County Clerk in Arizona and received the papers showing what had happened.

THE COURT: Mrs. Carson, you mentioned you went out with your son and daughter-in-law to California, indicating that you had received a summons. Did you ever yourself personally appear in the court proceeding in Arizona?

THE WITNESS: No. I called Mr. Lewis by telephone and he told me I didn't need to make an appearance.

THE COURT: All right.

Q When was it that you received the papers from the clerk showing what had transpired in the Arizona case?

THE COURT: Mr. Meldahl, our threshold step here

this morning is consideration of this motion to vacate the jurisdictional dismissal, and if the Court should see fit to grant that motion then it would be appropriate to go into these other questions involving the Arizona proceedings and what not, so I expect probably it would be just as well not to go further with that this morning. Just confine ourselves to this jurisdictional question.

You gentlemen have no further questions, do you?

MR. LAMBERT: Just a couple of questions.

RECROSS-EXAMINATION

BY MR. LAMBERT:

Q Mrs. Carson, when did you and your husband move to Arizona?

A We moved to Arizona—you mean from California?

Q When did you live in Arizona? Let's put it that way.

A Well, we came to Arizona in—it was January 19th, 1965. No, it was 1966. I'm sorry.

Q How long did you live there?

A We only lived there about—well, we left the 1st day of May; from the 19th of January until the 1st day of May.

Q Did you have a home at Phoenix, rent a home?

A We just rented a home temporarily.

Q Moved your furniture into it?

A Yes. We had planned on coming back to West Virginia and Mr. Carson wanted to stop over in Phoenix for a while.

Q Had you been living in California before this occasion?

A Yes.

Q Where had you lived in California?

A Well, we lived on Johnson Avenue in Costa Mesa for a period of time and then we lived—I can't think of the name of it.

THE COURT: She means prior to the time that they went to Arizona?

MR. LAMBERT: That's right.

A We moved from Johnson Avenue—my mind is blank for some reason.

Q What was the name of the town?

A Well, it's on the papers, but I can't remember.

Q You don't remember the name of the town you lived in?

A Fountain Valley, California.

Q How long did you live there?

A Well, really I don't know when we moved to Fountain Valley, but we left there the 19th day of January in '66.

Q Approximately how long had you lived in California, a month or a week? How long?

A You mean in California?

Q In California, yes.

A We moved there in '64, 1964, and left there in '66.

Q You had a home there?

A Yes, we rented a home.

Q Did you vote there?

A No.

Q So it was approximately two years you lived in this California home. Is that right?

A Something like that. That would have been a little less than two years.

THE COURT: It was stated as two years in the application, as I recall.

MR. LAMBERT: Thank you.

MR. MELDAHL: What did you regard as your home during the time you were in California?

THE WITNESS: I always regarded West Virginia as my home.

MR. MELDAHL: I believe that's all.

THE COURT: You may step down, Mrs. Carson.

(The witness was excused.)

THE COURT: All right, Mr. Meldahl, do you want to give me some remarks on your behalf, sir?

MR. MELDAHL: If your Honor please, so far as the California judgment which was introduced in the case be-

fore you is concerned—

THE COURT: It wasn't a California judgment.

MR. MELDAHL: I mean the Arizona judgment. The Arizona law provided that if a person was a resident of the state absent from the state or a transient or a citizen of another state—

THE COURT: Mr. Meldahl, let me interject this. As so often happens on motions of the type that were filed by Mr. Lambert and Mr. Thompson where they assign a multiplicity of grounds and the Court finds one ground that he feels has substance and will support the dismissal or the granting of the motion, he usually ties his action to that and doesn't fool around with the other assignments.

The only basis for my dismissal action was on this jurisdictional ground of the West Virginia long arm statute, so I think I would prefer just to confine our comment and our consideration here to that one aspect of it.

MR. MELDAHL: Well, the West Virginia statute provides that any of the following acts in this state, effected by mail or otherwise, by an unlicensed foreign or alien insurer: the issuance or delivery of contracts—

THE COURT: I am aware of what the statute says.

MR. MELDAHL: I think this morning we have shown that this insurance policy was actually mailed by this company to Mr. Carson here in West Virginia and that it was received here, as Mrs. Carson has testified, and that she was the one that received the envelope in which the policy came.

We have also introduced here three of the premium notices that were sent to this state. We have introduced two letters from this company which show that they were living in this state and that the company knew they were living in this state.

The application in the first place said that their new address was going to be in West Virginia and told them where. That was on April 22 that that application was filled out. They didn't issue this policy until June 22 and they had left Arizona on May 1st, so it was only about eight

days from the time he signed this application until they moved back to West Virginia and, of course, in the meantime she has testified that they didn't live in California.

When this policy was issued and they put the date on there of June 22, as to when they received the premium, they must have done that because that was certainly not in accordance with the application and it appears on the application itself that it was entirely different handwriting, so I don't know how this would be handled, that part of it out there, but we have shown by the receipts that were given as to what the transaction was and then, of course, they mailed these other notices to them here in West Virginia.

THE COURT: Mr. Meldahl, I notice you have a copy of the Federal Rules of Civil Procedure on the table. Under what particular rule do you feel the Court would be justified? This order of dismissal was entered last December, almost eleven months ago.

Mr. Lewis didn't see fit to appeal the action of the Court or take any further steps. Do you have, you feel, a permissive rule there that would allow this Court if it saw fit to rectify this thing?

MR. MELDAHL: We think Rule 60(b) covers that and that I think that mistake, inadvertence, surprise or excusable neglect, newly discovered evidence which by due diligence could not be discovered at the time of the motion for a new trial under Rule 59(b), fraud, whether heretofore denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party; we think there is clear misrepresentation in this case to this Court and I think it definitely deceived this Court and Mr. Lewis, for that matter, when they said that all of these transactions had transpired and been completed in all respects in the State of Arizona.

The records that we have introduced here this morning show that it was not in accordance with that. The rule also says, "And any other reason justifying relief from the operation of the judgment." In this case I think this lady here did just about all she could do.

THE COURT: Has your research revealed any case, Mr. Meldahl, that might be analagous to our situation here, speaking now about the Rule 60(b) aspect of it.

MR. MELDAHL: I must confess that I haven't had time enough since I started this proceeding. This hearing came on a little quicker than I expected it to. I would like to submit a brief after I have had an opportunity to go more thoroughly into that question.

I do feel that under the circumstances of this case she ought not to be charged with any negligence of Mr. Lewis, and I do think that he should have been more diligent in presenting these things and when this matter arose, if he knew about it, to have done something. I expected Mr. Lewis to be here this morning to explain that but he didn't come as he promised me he would do, and so it took me somewhat by surprise that he didn't, but it does seem to me that under the circumstances of this case this woman should not be deprived of the insurance to which I think she was clearly entitled. I think she should have been able to have gotten it promptly from this company because this company knew these facts.

THE COURT: At least what your argument is, you feel that she should not be deprived of her day in court as to whether or not she is entitled to the insurance.

MR. MELDAHL: Yes, I think so.

THE COURT: At this juncture that's what we are concerned with.

MR. MELDAHL: And I think in fact this company did make false statements to this Court, Even the last affidavit that came here is in conflict with the evidence we have presented here this morning, which shows very definitely that they knew where they were, that they were going to West Virginia, and at the time they wrote this policy after they had already returned to West Virginia that they were agreeing to insure this benificiary in the State of West Virginia.

I think while they issued the policy out there they were nevertheless agreeing to insure Mr. Carson here and

I think that they misled and misrepresented it and deceived the Court by saying otherwise, and the records here show that.

THE COURT: All right, sir. Mr. Lambert, do you or Mr. Thompson have some remarks you would like to make?

MR. LAMBERT: Very briefly, your Honor.

THE COURT: I'll tell you gentlemen exactly what I am interested in and I am going to give you an opportunity to file memoranda on it. I am interested in the pivotal question which to me right now is the limits of the permissive area of this Court eleven months after it has entered a dismissal order on a motion of a defendant to reconsider it in the light of any evidence that might be presented in a situation where this was not after discovered evidence.

Of course, the evidence was here all the time, and no one disputes that. No evidentiary hearing was asked for, no evidence was presented other than the affidavits when this Court considered the motion initially.

The question that I am confronted with and the threshold question that we must meet is whether under Rule 60(b) or any other rule of the Rules of Civil Procedure the Court would be permitted at this late juncture to grant this motion of Mr. Meldahl's if the Court felt that there was a sound basis for doing it. I think that's our threshold question now; in other words, does the Court have an area within which it could or should properly consider this material, aside from what the Court might decide about it.

MR. LAMBERT: I am like Mr. Meldahl. I haven't had time to research that problem, but it is my impression that 60(b) is rather explicit in the reasons for setting aside a judgment and one of these, of course, is after discovered evidence and we don't have that in this case.

The only material fact that I have seen presented here this morning is the fact actually the insurance was paid for by a receipt dated on the 1st day of April, 1966, when the defendant was living in Arizona. The fact that some premium notices were sent here when no premium

was due I don't think would have any particular significance.

THE COURT: Do you think there is any significance that the company mailed the policy to Mr. Carson here in West Virginia?

MR. LAMBERT: As far as I know the situation was this, your Honor. The company mailed the policy to Mr. Vanderhoofven for delivery to Mr. Carson at his Arizona address. Evidently Mr. Vanderhoofven knew that Mr. Carson wasn't in Arizona, and he in turn is the gentleman who mailed the policy here.

THE COURT: One of the letters there indicates that the company was aware of that when Mr. Carson inquired about the policy.

MR. LAMBERT: He reported that to the company and they said the policy had been delivered to him by Mr. Vanderhoofven.

THE COURT: From a standpoint of the constitutional question of the long arm statute you have got the McGhee case, which indicates, or at least the Supreme Court recognized that the state of domicile had a particular and peculiar interest in these cases involving insurance and nonresident insurance companies.

Whether there is enough here or not that if I had had the authority to consider it to change my position on the motion I am not divulging here this morning; I don't know, but at least to clear the air what I am interested in is how far can a Court go under Rule 60(b), and that's what I would like to have you gentlemen favor me with your memoranda on.

Mr. Meldahl, what is your schedule? We are getting into the Christmas season. I have three weeks of pretrial conferences. From my standpoint I am not interested in hurrying you.

MR. MELDAHL: I think two weeks would be ample time, but I would like to call the Court's attention to the fact that it was not eleven months; it was just a few days over ten months that they filed this application.

THE COURT: Very well. Suppose you file your memorandum, Mr. Meldahl, and serve a copy on these gentlemen and then they can file a responsive memorandum.

MR. THOMPSON: I wanted to inquire about the scope of your concern. Does it involve only the time limitation?

THE COURT: All I am interested in in the context of what we have here in this case, what permissive area, if any, does this Court have under Rule 60(b) to reconsider its action on that motion?

I assume that you gentlemen would take the position that there are no grounds demonstrated here that would permit the Court to reconsider it under 60(b) and I assume Mr. Meldahl will strenuously search the books to find something that indicates the Court does have authority. That's what I am interested in. Whether it is ten months or eleven months is not important in the overall principle of the thing.

I, Betty Bratton, official reporter of the United States District Court for the Southern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript of all the evidence introduced and proceedings had in the hearing of the case of Dorothy L. Carson, plaintiff, v. American Savings Life Insurance Company, defendant, on the 21st day of November, 1969, as reported by me in shorthand.

Given under my hand this 27th day of November, 1969.

Betty Bratton

Mr. C. Vandenbroek
4611 W. Berridge Lane
Glendale Arizona

REGISTERED
222365

Mrs. Lyle H. Cameron
3705 Washington St. S.W.
So. Charleston W. Virginia
25309

JUN
1966
JUN
1966
JUN
1966

Petr. 7

NOV 2 1 1969

Case No. 3653

Petr. 8

NOV 2 1 1969

Case No. 3653

Petr. 9

NOV 2 1 1969

Case No. 3653

NOV 21 1969
3653

PAY TO THE ORDER OF

NOV 21 1969
3653

Defendants Ex. No. 1
For Identification
Filed NOV 2 1970
Case No. 3467

Re, also For Double Indemnity RECORDED 9:52 A.M. Fall H.T.

DO NOT DETACH UNLESS FULL FIRST PREMIUM IS PAID WITH APPLICATION

Received from Lyle Carson 5 UNITS No 20271

the sum of Twenty Five Hundred & 00/100 ( ) Dollars Five Hundred

for the full first premium covered by the application for insurance in the American Savings Life Insurance Company which bears the same date and serial number as this receipt. This insurance under the policy for which application is made shall be effective as of the date of the receipt of the first premium thereon, provided the application and examination have been approved and the policy delivered and accepted during the good health of the proposed insured and while his occupation and habits are as described in the application, and provided no policy or binder has been issued by the Company or its agents covering the proposed insurance. This receipt is void if any of the premium note are dated prior to the application, or if any of the statements made in the application are untrue, or if the Company declines to issue a policy or issues a policy other than the policy for which application is made, unless the Company shall issue or deliver hereunder a policy as issued by the Home Office and a personal note satisfactory to the Company for the remainder of the premium.

April 6, 1966

H. T. Vandenberg Agent

If you do not receive your Policy or hear from the Company within 60 days, write us.

VALLEY NATIONAL BANK

PALETTA AND FIRST ST. OFFICE PHOENIX, ARIZONA

April 23 66

Pay to the order of H. T. Vandenberg $25.00

Twenty Five & 00/100 DOLLARS

LYLE H. OR DOROTHY L. CARSON

For Lyle H. Carson

1221-01740 304-2048

RECEIPT OF PAYMENT

AMERICAN SAVINGS LIFE INSURANCE COMPANY

YOUR CANCELLED CHECK IS YOUR RECEIPT

Paid by Check No. Paul Dan 6-24-66

Amount $2,475.00 Policy No. 6038 Plan H.S.P.

Age June 22, 1966

Paid To Date 22 Jun 1967

Lyle H. Carson
3708 Washington Street, South West
South Charleston, West Virginia

RETAIN THIS SECTION FOR YOUR RECORD

PREMIUM DUE . . .

AMERICAN SAVINGS LIFE INSURANCE COMPANY
3336 N. 7TH ST. • PHOENIX, ARIZONA 85014

HEREBY GIVES NOTICE THAT A PAYMENT WILL BECOME DUE AND PAYABLE, AS SPECIFIED BELOW, PROVIDED THE POLICY IS THEN IN FORCE.

PAYMENT SHOULD BE MADE TO COMPANY AT ITS HOME OFFICE, PHOENIX, ARIZONA

AMOUNTING TO	POLICY NO.	PAYABLE	DATE DUE
$222.83	6038	M	Aug. 22, 1966

Lyle H. Carson
3708 Washington Street, South West
Southe Charleston, West Virginia

97-213.92

PLEASE DETACH AND RETURN THIS NOTICE WITH YOUR REMITTANCE.
A RECEIPT WILL BE SENT ONLY UPON REQUEST.
IMPORTANT! This is the only notice of the above payment that will be sent.

PREMIUM DUE . . .

AMERICAN SAVINGS LIFE INSURANCE COMPANY
3336 N. 7TH ST. • PHOENIX, ARIZONA 85014

HEREBY GIVES NOTICE THAT A PAYMENT WILL BECOME DUE AND PAYABLE, AS SPECIFIED BELOW, PROVIDED THE POLICY IS THEN IN FORCE.

PAYMENT SHOULD BE MADE TO COMPANY AT ITS HOME OFFICE, PHOENIX, ARIZONA

AMOUNTING TO	POLICY NO.	PAYABLE	DATE DUE
$222.83	6038	M	Sept. 22, 1966

Lyle H. Carson
3708 Washington Street, South West
South Charleston, West Virginia

97-213.92

PLEASE DETACH AND RETURN THIS NOTICE WITH YOUR REMITTANCE.
A RECEIPT WILL BE SENT ONLY UPON REQUEST.
IMPORTANT! This is the only notice of the above payment that will be sent.

RECORD OF PAYMENT . .

AMERICAN SAVINGS LIFE INSURANCE COMPANY
3336 N. 7TH ST. • PHOENIX, ARIZONA 85014
PHONE 266-5489
YOUR CANCELLED CHECK IS YOUR RECEIPT

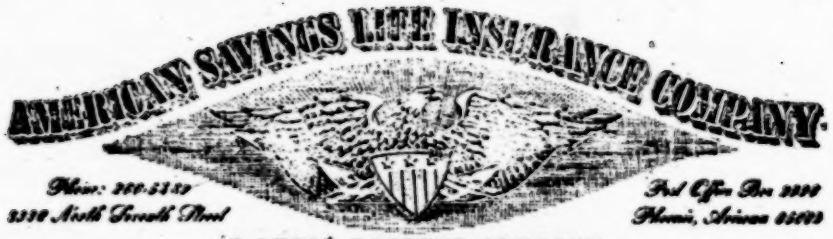
PAID BY CHECK NO._____DATE_____

AMOUNTING TO	POLICY NO.	PAYABLE	DATE DUE
$222.83	6038	M	Oct. 22, 1966

Lyle H. Carson
3708 Washington Street, South West
South Charleston, West Virginia

97-213.92

RETAIN THIS SECTION FOR YOUR RECORD



A LEGAL RESERVE COMPANY

July 18, 1966

Lyle H. Carson
1548 Jackson Street
Charleston, W. Va.

Dear Mr. Carson:

This is in reply to your inquiry concerning the life insurance purchased from our Agent, Mr. Vanderhoofven.

We are sorry to advise that your policy No. 6038 was mailed to the wrong address. However, Mr. Vanderhoofven has since mailed it to your present address. If you have not received same, please let us know.

We appreciate your kind consideration in sending the referrals to Mr. Vanderhoofven.

Yours very truly,

AMERICAN SAVINGS LIFE INSURANCE COMPANY

Lucy Broberg
Lucy Broberg
Correspondence Dept.

Plff. No. 5
For
Filed NOV 21 1969
Case No. 3653

AMERICAN SAVINGS LIFE INSURANCE COMPANY

Phone: 271-5489
3336 North Seventh Street

Post Office Box 2000
Phoenix, Arizona 85002

A LEGAL RESERVE COMPANY

November 15, 1966

Dorothy L. Carson
1548 Jackson Street
Charleston, West Va.

Dear Mrs. Carson:

We wish to extend our sincere sympathy in the loss of your husband, Lyle H. Carson, who was insured by this Company on policy No. 6038.

We are enclosing the necessary forms, which you will need to read carefully and complete in every detail possible.

Please return these forms to us with the additional papers requested and your insurance policy, at which time we will promptly process your claim and advise you.

Sincerely,

AMERICAN SAVINGS LIFE INSURANCE COMPANY

Richard Unangst
Richard Unangst
Comptroller

Certificate No. 6
New Shares Issued
Date NOV 2 1 1969
Case No. 3653

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 71-1801

Dorothy L. Carson,

Appellant,

versus

American Savings Life Insurance Company,

Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John A. Field, Jr. Chief District Judge.

(Decided February 4, 1972.)

Before Haynsworth, Chief Judge, Winter, Circuit Judge, and Chapman, District Judge.

Horace S. Meldahl on brief for Appellant; and Harry B. Lambert (Standage, Allen & Phelps Conley, Thompson, Lambert & Legg of Counsel) on brief for Appellee.

Per Curiam:

Appellant instituted this action in the Court of Common Pleas of Kanawha County, West Virginia, as the beneficiary of a certain life insurance policy issued by American Savings Life Insurance Company ("American") on the life of her husband, Lyle H. Carson. American removed the action to the District Court for the Southern District of West Virginia on the ground of diversity of citizenship.

The district court dismissed the action on December 20, 1968, for lack of in personam jurisdiction over American. Subsequently, Mrs. Carson filed a motion on October 22, 1969, apparently seeking relief under Rule 60(b), Fed.R.Civ. P., from the dismissal order; the district judge denied this motion in a memorandum order dated June 9, 1971. On June 15, 1971, appellant filed a motion for "reconsideration" of her October 22, 1969 motion, and reconsideration was denied by the district court by order of July 8, 1971, as being "without merit."

On July 29, 1971, appellant noted her appeal from the district court's orders of June 9, 1971, and July 8, 1971. American contends that appellant's notice of appeal with respect to the district court's order of June 9, 1971, is untimely. However, a motion for "reconsideration"[1] is functionally a motion under Rule 59(e), Fed.R.Civ.P., and abates the running of the thirty-day period within which to appeal. The thirty-day appeal period begins to run anew from the entry of an order disposing of the motion for reconsideration. 9 J. Moore, Federal Practice ¶ 204.12(1), at 949 (2nd Ed. 1970).

1. A motion for reconsideration is timely if filed pursuant to Rule 59(e) within ten days from entry of the judgment complained of. Appellant's motion for "reconsideration" of her motion under Rule 60(b) was clearly filed within ten days from June 9, 1971. 9 J. Moore, Federal Practice ¶ 204.12(2), at 954 (2nd Ed. 1970). See Gainey v. Brotherhood of Ry. & S.S. Clerks, 303 F. 2d 716 (3 Cir. 1962).

Upon examination and consideration of the record, briefs, and motions for summary dismissal and affirmance, however, we conclude that the appeal is without merit.

The district court in its order of June 9, 1971, erroneously stated, as one of its reasons for denying the appellant's motion of October 22, 1969, that appellant had made no allegation of fraud in that motion. While it appears from the record that appellant, in her October 22, 1969, motion, did, in fact, charge that American had perpetrated a fraud upon the district court which induced the court to enter its dismissal order of December 20, 1968, it further appears that the charge of fraud lacked adequate support in the record. Therefore, we conclude that this error of the district court was harmless.

Accordingly, we dispense with oral argument and affirm for the other reasons stated by the district court in its order of June 9, 1971.

Affirmed.

FILED MARCH 14, 1972, SAMUEL W. PHILLIPS, CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 71-1801

Dorothy L. Carson,

Appellant,

versus

American Savings Life
Insurance Company,

Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John A. Field, Jr., Chief District Judge.

ORDER

Upon careful consideration of the petition to rehear, and with the concurrences of Judge Winter and Judge Chapman, the petition is denied.

FOR THE COURT:

Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

A True Copy, Teste:
Samuel W. Phillips, Clerk
by Diane Burke
Deputy Clerk

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

DOROTHY L. CARSON,

Plaintiff,

v. CIVIL ACTION NO. 3653

AMERICAN SAVINGS LIFE INSURANCE COMPANY,

Defendant.

ORDER

By order entered herein on June 9, 1971, the motion of the plaintiff to vacate the order of dismissal entered in this action on December 20, 1968, was denied for the reasons therein stated. The plaintiff by her counsel filed a motion on June 15, 1971, which, in effect, asks that this Court reconsider the aforesaid order entered on June 9, 1971.

Upon consideration of this latest motion, the Court is of the opinion that the same is without merit, and accordingly IT IS ORDERED that the motion of the plainiff for reconsideration be and the same is hereby denied.

The Clerk is directed to send a certified copy of this order to counsel of record.

ENTER: July 8, 1971.
John A. Field, Jr.
U. S. District Judge

A TRUE COPY
James A. McWhorter
Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

DOROTHY L. CARSON,

Plaintiff,

v. CIVIL ACTION NO. 3653

AMERICAN SAVINGS LIFE
INSURANCE COMPANY,

Defendant.

MEMORANDUM ORDER

In this action which was originally instituted in the State court and removed to this Court on the grounds of diversity jurisdiction, the plaintiff seeks to recover the proceeds of a certain policy of life insurance issued by the defendant upon the life of her husband, Lyle H. Carson, and in which she was named the sole beneficiary. The policy in the face amount of $60,850.00 was issued on June 23, 1966, and the insured died on November 1, 1966. The defendant is an Arizona corporation and service in this case was effected pursuant to the provisions of Chapter 33, Article 4, Section 13 of the Code of West Virginia, which code section provides in effect for service through the State Auditor upon an unauthorized insurer in this State. The defendant corporation filed a motion to dismiss the action or to quash the return of service of process, and by order entered herein on December 20, 1968, the motion of the defendant was granted and the action was dismissed without prejudice and retired from the docket of this Court. The dismissal order incorpor-

ated the letter opinion of this Court dated November 29, 1968, which opinion explicated the reasons for the action of the Court.

On October 22, 1969, the plaintiff filed a paper entitled "Motion to Vacate Order of Dismissal As Improvidently Awarded and Reinstate Civil Action No. 3653." The plaintiff was originally represented in this action by Dean E. Lewis, Esquire, but apparently, following the dismissal order in December, 1968, the plaintiff retained the services of Horace S. Meldahl, Esquire, and the latter attorney filed the motion to vacate. The dismissal order of December 20, 1968, was submitted and inspected by counsel for both parties, and the grounds assigned in support of the motion to vacate reflect to a large degree the disenchantment of the plaintiff with the services rendered to her by Counsellor Lewis.

Many of the allegations set forth in support of this latest motion are irrelevant to the issue originally before this Court and many are purely conclusory in nature. In any event, none of the allegations of the plaintiff's motion would fall within the ambit of the first five subdivisions of Rule 60(b). There are no allegations of mistake, inadvertence, surprise, excusable neglect or fraud; and there is no contention that any of the facts delineated in the motion could be characterized as "newly discovered evidence." Accordingly, it is clear that the only possible channel of relief open to the plaintiff on her motion would be under Rule 60(b) (6). A review of the motion in the light of the entire record in this case fails to persuade me that this is an extraordinary situation which would require that this Court reopen this case. The plaintiff was represented by counsel and had the opportunity to appeal from the action of this Court in dismissing the case for lack of in personam jurisdiction. Instead of pursuing appellate review of the order of December, 1968, the plaintiff did nothing except consult another attorney who then saw fit to file the motion to vacate more than ten months after the dismissal order had

been entered. While the plaintiff alleges that her failure to take timely action in the premises was due to the fact that her original attorney failed to properly and promptly advise her of the Court's action, I do not believe that this is sufficient to bring her within the "catchall provision" of Rule 60(b) (6).

In the final analysis, the plaintiff's motion is not timely filed; does not present facts upon which the Court should disregard the finality of the dismissal order of December 20, 1968; and, in any event, the totality of the allegations in the motion to vacate do not present a factual format which would support jurisdiction over the defendant under the West Virginia "long-arm" statute, or bring this case within the permissive constitutional area of McGee v. International Life Ins. Co., 355 U. S. 220.

For the foregoing reasons, IT IS ORDERED that the motion of the plaintiff to vacate the order of dismissal entered herein on December 20, 1968, be and the same is hereby denied.

The Clerk is directed to send a certified copy of this order to counsel of record.

ENTER: June 9, 1971.
John A. Field, Jr.
District Judge

A TRUE COPY,
James A. McWhorter
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESON 29, WEST VIRGINIA

Chambers of
JOHN A. FIELD, JR., DISTRICT JUDGE

November 29, 1968

FILED
DEC. 3, 1968
CLERK'S OFFICE, U. S.
DIST. COURT, SO. DIST. W. VA.
VIRGIL F. FRIZZELL, CLERK

Harry B. Lambert, Esquire
Attorney at Law
1101 Union Building
Charleston, West Virginia

Dean E. Lewis, Esquire
Attorney at Law
1500 Kanawha Boulevard, E.
Charleston, West Virginia

Re: Dorothy L. Carson v. American Savings Life Insurance Company—Civil Action No. 3653

Gentlemen:

This action was originally instituted in the Court of Common Pleas of Kanawha County, West Virginia, and was removed to this Court on the grounds of diversity jurisdiction. The complaint alleges that Lyle H. Carson was the insured under a life insurance policy in the face amount of $60,850 issued by the defendant on June 23, 1966. The complaint further alleges that Carson died on November 1, 1966, and that the plaintiff is the surviving wife and bene-

ficiary under the insurance policy here in question. The complaint alleges that the defendant has wrongfully refused to honor the plaintiff's claim under the policy and seeks herein to recover the face amount of the policy and, additionally, $50,000 in "compensatory damages" and another $50,000 for "punitive damages." While the basis for the request for these so-called compensatory and punitive damages escapes the Court that question is not relevant on the issue presented for disposition.

The defendant is an Arizona corporation and service in the present case was effected through the office of the State Auditor of West Virginia pursuant to the provisions of Chapter 33, Article 4, Section 13 of the Code of West Virginia, the Auditor's return stating that the defendant is an unauthorized insurer in this State under that particular statute. The defendant has filed a motion to dismiss the action or in lieu thereof to quash the return of service of process upon the defendant upon the following grounds:

(1) The defendant as an Arizona corporation is not subject to service of process within the State of West Virginia.

(2) The defendant has never had its principal office nor any other office in the State of West Virginia; has never qualified to do business in this State; and has never employed any agent or representative to solicit; sell or service any of its insurance contracts in West Virginia.

(3) At no time during the year 1966 nor at any time thereafter did the defendant publish or distribute any advertising material or solicit business in the State of West Virginia, nor did it sell or deliver any insurance contracts to residents of the State of West Virginia.

(4) The insurance policy here in question was issued in reliance upon as applciation which was signed by the insured in the State of Arizona.

(5) The insured, Carson, submitted to a physical ex-

amination incident to the issuance of the insurance policy by a doctor in the State of Arizona.

(6) The application and report of the medical examination indicated that Carson was at that time a resident of the State of Arizona.

(7) The contract was delivered to the insured in the State of Arizona and all premiums incident to the policy were paid to the defendant in the State of Arizona and from a source within that State.

(8) Every act related to the transaction incident to the issuance of the policy and the payments of premiums thereon were performed in the State of Arizona.

The dismissal motion is supported by an affidavit executed by the president of the defendant insurance company. The affidavit supports the basic grounds assigned in the motion particularly in regard to the absence of any business activities of the defendant in the State of West Virginia. The affidavit, as well as the copy of the application which was filed as an exhibit with the complaint, indicates that at the time of the application on April 22, 1966, Carson indicated that his residence was in Phoenix, Arizona. He further indicated that his previous residence had been in the State of Calfornia and that his new address would be 1548 Jackson Street in Charleston, West Virginia The policy in question, No. 6038, was delivered to Carson in Phoenix, Arizona, on or about June 30, 1966. Premiums on the policy were paid on a monthly basis at the rate of $213.92 monthly. Premiums in that amount were paid on the following dates: June 27, 1966, August 15, 1966, September 21, 1966 and October 20, 1966. Each of these premiums was paid to the Company by one Vanderhoofen, a resident of Phoenix, Arizona, and a soliciting agent of the defendant company. While it was not disclosed to the Company at that time, Vanderhoofen was making such payments pursuant to a personal business transaction between him and the insured, Carson.

In the disposition of the dismissal motion it is first of all necessary to determine whether on these facts the defendant was subject to service of process through the State Auditor under the provisions of the West Virginia Code, and, in any event, whether service under these circumstances would comport with traditional notions of fair play and substantial justice and satisfy jurisdictional due process under the principles set forth in the landmark case of International Shoe Co. v. State of Washington, 326 U.S. 310.

The legislative purpose of Chapter 33, Article 4, Section 13, states "*** that it is a subject of concern that many residents of this State hold policies of insurance issued or delivered in this State by insurers while not licensed to transact insurance in this State; ***." (Emphasis added.) The acts of the unlicensed insurer which are deemed under the statute to constitute the appointment of the Auditor of West Virginia as the insurer's attorney for the purpose of accepting service of legal process are specified as follows: "(1) The issuance or delivery of contracts of insurance to residents of this State ***, (2) the solicitation of applications for such contracts, (3) the collection of premiums *** for such contracts, or (4) any other transaction of business, ***."

The undisputed facts in the present case clearly demonstrate that the defendant insurance company did not at any time material hereto fall within the terms of (1), (2) or (4) of the statute as hereinabove set forth. Nor in my opinion does the record show that the requisite acts under item (3) relative to the collection of premiums are present in this case. The plain import of the statutory language indicates that the collection of premiums under item (3) means the collection of premiums "for such contracts" which had their genesis in the activities specified in item (1) and item (2), that is, contracts solicited from or issued or delivered to residents of West Virginia. To read item (3) in any other manner would in my opinion place any insurer at the jurisdictional mercy of a peripatetic insured in a case such as

the present, where the insurer has engaged in no purposeful conduct whatever within the forum state. Accordingly, it is my conclusion that service of process upon the defendant in the present case through the State Auditor was improper and invalid by reason of the fact that the conduct of the defendant fails to fall within any of the enumerated categories of conduct specified in the West Virginia process statute. This conclusion is buttressed by the fact that in the present case none of the premium payments were sent from West Virginia to the Arizona insurer.

Additionally, I am of the opinion that the standard of due process explicated in the International Shoe case would not sustain in personam jurisdiction over the defendant. There was no solicitation of business or collection of premiums here which would bring the defendant within the ambit of McGee v. International Life Ins. Co., 355 U.S. 220. To the contrary, the present case falls within the pattern of Hanson v. Denckla, 357 U.S. 235, where the Court observed:

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

For the foregoing reasons the motion of the defendant to dismiss this action for lack of jurisdiction will be granted. Counsel may prepare an appropriate order to that effect incorporating this letter ruling by reference therein.

Very truly yours,
John A. Field, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA

DOROTHY L. CARSON,

Civil Action No. 3653

Plaintiff,

Removed from the Court of
vs. Common Pleas of Kanawha County,
West Virginia.

AMERICAN SAVINGS LIFE (Civil Action No. 11,060-C)
INSURANCE COMPANY,

Defendant.

This action came on to be heard on the written motion of the defendant heretofore filed herein to dismiss this action, or in lieu thereof, to quash the return of process for the reasons and upon the grounds stated in said motion. Upon consideration of the pleadings, said motion and the affidavits filed herein by the plaintiff and the defendant, the Court is of the opinion to and doth hereby sustain said motion of the defendant for the reasons stated in the written opinion of the Court rendered under date of November 29, 1968, which opinion is by reference incorporated herein and made a part hereof.

It is therefore, ORDERED that this action be, and the same is, without prejudice, hereby dismissed at the costs of the plaintiff and retired from the docket of this Court.

Dated this 20th day of December, 1968.

ENTER:

United States District Judge

PRESENTED BY:

Attorney for Defendant

APPROVED BY:

Attorney for Plaintiff

AFFIDAVIT

STATE OF ARIZONA,
COUNTY OF MARICOPA, to-wit:

This day personally appeared before me, the undersigned authority, Frihoff N. Allen, who being by me first duly sworn, deposes and says:

1. That he is a resident of the City of Phoenix, Arizona and is now employed by American Savings Life Insurance Company in the position of President, and has been so employed continuously since the 24th day of April, 1954; that he is familiar with the business activities of said Company and that this affidavit is based upon his own personal knowledge, or upon information which affiant has acquired from the records of said Company which have been kept in the regular course of business and under his supervision and control;

2. That American Savings Life Insurance Company is a corporation organized and existing under the laws of the State of Arizona, with principal offices in the City of Phoenix, Arizona; that said Company has never qualified to do business in the State of West Virginia, and has never employed any agent or representative to solicit, sell or service insurance contracts in the State of West Virginia; that at no time during the year 1966, or at any time thereafter, did said Company publish or distribute any form of advertisement or solicitation in the State of West Virginia, and said Company did not sell or deliver any insurance contract to residents of West Virginia;

3. That said Insurance Company issued its policy No. 6038 on the life of Lyle H. Carson under date of June 23, 1966; that said contract was issued pursuant to and in reliance upon the statements made in a certain "Application No. 22527" which application was signed by said Carson un-

der date of April 22, 1966; that said application stated that the applicant resided at 17425 N. 21st Drive, Phoenix, Arizona, and had resided at said address for a period of three months prior to the date of said application; that said applicant had formerly resided at "17825 Santa Gertrudes, Fountain Valley, Orange County, California"; that said application further shows that applicant's "Mail address will be" 1548 Jackson Street, Charleston, West Virginia, but gave no indication or information of the time or date upon which said new address would become effective, or that applicant ever intended in fact to change his residence to said new address; that on or about April 23, 1966, said Carson appeared before Dr. Wilson T. Shill in the City of Phoenix, Arizona for a physical examination, the report of which is attached to and made a part of the policy issued to said Carson; that said Company relied upon the facts stated in said application and report of medical examination and issued said insurance contract to said Carson as a resident of the State of Arizona; that said Company delivered said contract of insurance to its agent H. T. Vanderhoofen in the City of Phoenix, Arizona; and, upon information and belief that said Vanderhoofen, who was an agent for said Company in said City of Phoenix, Arizona, delivered said contract to said Carson in the City of Phoenix on or about June 30, 1966; that on the last mentioned date said Carson signed a receipt for said policy, which receipt said Vanderhoofen mailed to said Company, a copy of which is attached hereto and made a part hereof;

4. That the premiums on said insurance contract were paid on a month to month basis at the rate of $213.92 monthly; that these premiums were paid to said Company for a period of four months only and on the following dates: June 27, 1966, August 15, 1966, September 21, 1966 and October 20, 1966; that each and every premium aforesaid was paid to said Company by H. T. Vanderhoofen, a resident of Phoenix, Arizona; that the records of said Company show that said premiums were paid by a credit on the commission

of said Vanderhoofen of 96% and by a payment of 4% in cash by Vanderhoofen; that while said Company did not know at the time said premiums were so credited and received, it is now advised upon information that on or about April 22, 1966, said Carson possessed a franchise to act as agent in the State of Arizona for Carnegie Napoleon Hill Academy of Columbia, South Carolina; that said Carson assigned his said franchise to H. T. Vanderhoofen upon the agreement that said Vanderhoofen would pay the first year's premium on the policy issued by said Company to said Carson; that said Company had no knowledge whatsoever of this agreement between said Vanderhoofen and Carson; that such an agreement by Vanderhoofen was not within the scope of his authority as agent for said Company; but as a consequence thereof all premiums received by said Company on said policy were actually paid by said Vanderhoofen, a resident of Phoenix, Arizona, pursuant to his said agreement with said Carson;

5. That said insurance policy No. 6038 was issued by the Company to said Carson in good faith; that said Company, relying upon the statements made in said application, believed that said Carson was a resident of Arizona when said policy was issued; that said contract was not issued to said Carson pursuant to any solicitation made by said Company in the State of West Virginia; that all premiums paid on said insurance contract were received by the Company from H. T. Vanderhoofen of Phoenix, Arizona, and none were transmitted to said Company by anyone residing in the State of West Virginia; that said American Savings Life Insurance Company never had any business transactions of any kind or character with said Lyle H. Carson prior to the application for and the issuance of said insurance policy; that every act related to the transaction whereby said policy was issued to Carson, including the application he made for said policy, his physical examination by Dr. Wilson T. Shill, the issuance of said policy by said Company, the payment of each and every premium thereon,

occurred in the State of Arizona at a time when said Carson was a resident of Arizona; wherefore, affiant is informed and believes that the Court of Common Pleas of Kanawha County, West Virginia and the District Court of the United States for the Southern District of West Virginia have no jurisdiction to determine the issues raised by the pleadings filed in Civil Action No. 3653, now pending in said District Court for the reason that service of process on the defendant named therein upon the Auditor of the State of West Virginia is void and of no effect.

Frihoff N. Allen

Taken, subscribed and sworn to before me this 22nd day of January, 1968.

Notary Public

Note: The Notarys signature is not decipherable and the Notary's Seal was ommitted.

My commission expires Nov. 9th, 1970.
Notary's Seal typed, none applied.